Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
of 1991	)	
	)	

WORLDCOM COMMENTS

Karen Reidy
WorldCom, Inc.
1133 19th Street, NW
Washington, DC 20036
(202) 736-6489

December 9, 2002

SUMMARY

WorldCom opposes the adoption of a national "do-not-call" (NDNC) list for the following reasons: 1) the ultimate costs to consumers, in terms of increased prices and loss of information, outweighs the benefits of such a list; 2) a NDNC would have a devastating impact on the competitiveness of the telecommunications industry, particularly since it substantially favors incumbent providers; 3) there are no significant changes in relevant circumstances since the Commission first considered and declined to implement NDNC; 4) such a regime would pose unconstitutional restrictions on commercial free speech; 5) adopting a national no call list in conjunction with the Federal Trade Commission's (FTC) proposal would violate the requirements of the Telephone Consumer Protection Act (TCPA); and 6) implementing NDNC would impose an undue burden on common carriers.

WorldCom generally supports the comments being filed today by The Direct Marketing Association (DMA), specifically "Part I – Comments Regarding the Current Rules." WorldCom, for the most part, opposes any modifications to the current regulations on telemarketing practices. WorldCom does, however, urge the Commission to revisit its rule requiring that company-specific "do-not-call" requests be honored for ten years from the time the request is made. WorldCom recommends a five-year period. Moreover, WorldCom does not see a need for the regulation of predictive dialers. However, if the Commission chooses to regulate the abandonment rate of predictive dialers the mandated rate should be no less than a 5% rate.

In evaluating the current and proposed rules governing telemarketing practices the Commission should consider the following material facts:

- Telemarketing benefits the economy. It generates hundreds of millions of dollars in sales a year. It is responsible for nearly one third of all direct sales.
- Telemarketing is beneficial to the individual consumer. Fifty percent of surveyed households purchased a product or service over the telephone in the past year. Telemarketing significantly contributes to the reduction in prices of competitive services such as telecommunications services. Telemarketing keeps consumers informed of new offerings.
- Telemarketing is critical to the competitiveness of service industries such as the telecommunications industry. The majority of all MCI sales - including its new competitive offering, The Neighborhood - are the result of telemarketing efforts.

Some of the regulations being considered in this proceeding could have devastating consequences. In particular:

- NDNC will have a detrimental impact on development of competition in the local telecommunications service market. MCI has found that its local market penetration is up to 60% higher in states without a state "do-not-call" list.
- NDNC will substantially favor incumbent telecommunications providers which have an established business relationship with nearly all of the consumers in-region. The TCPA exempts companies with an established business relationship from the effects of such a list, consequently making the incumbents virtually exempt from the effects of such a list.
- Regulation that directly or effectively bans or severely restricts the use of predictive dialers will substantially raise marketing costs. MCI tests found that

attempts to reduce the abandonment rate on predictive dialers from MCI's current 3-5% rate to a 1% rate reduced productivity by 50%.

The Commission also seeks comment on the availability of any technological tools that may allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or recognize wireless numbers that have been assigned from a pool of numbers that formerly were all wireline. It is WorldCom's view that the time is not ripe to assess, or address, the impact that number portability and number pooling may have on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
of 1991	)	
	)	

WORLDCOM COMMENTS

WorldCom, Inc. (WorldCom) respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking (*Notice*), in the above-referenced dockets, released on September 18, 2002.[1]

In its *Notice* the Commission seeks comment on whether it should revisit the option of establishing a national do-not-call (NDNC) list.[2] WorldCom opposes the adoption of a NDNC list for the following reasons: 1) the ultimate costs to consumers, in terms of increased prices and loss of information, outweighs the benefits of such a list; 2) a NDNC would have a devastating impact on the competitiveness of the telecommunications industry, particularly since it substantially favors incumbent providers; 3) there are no significant changes in relevant circumstances since the Commission first considered and declined to implement NDNC; 4) such a regime would pose unconstitutional restrictions on commercial free speech; 5) adopting a national no call list in conjunction with the Federal Trade Commission's (FTC) proposal would

[1] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278 and CC Docket No. 92-90, FCC 02-250 (rel. Sept. 18, 2002)(*Notice*).

violate the requirements of the Telephone Consumer Protection Act (TCPA);[3] and 6) implementing NDNC would impose an undue burden on common carriers.

The Commission also seeks comment on the effectiveness, and need for modification, of its current rules governing unwanted telephone solicitations and the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimiles.[4] The Commission also seeks comment on the effectiveness of company-specific do-not-call lists.[5] With regard to these issues, WorldCom supports the comments being filed today by The Direct Marketing Association (DMA), specifically "Part I – Comments Regarding the Current Rules."[6] WorldCom, for the most part, opposes any modifications to the current regulations on telemarketing practices,[7] and hereby provides additional comment on the effectiveness of company-specific lists, the benefits of predictive dialers, and our concern with the proposed regulations of predictive dialers.

Furthermore, the Commission seeks comment on any future developments that may affect telemarketing to wireless phone numbers. In particular, the Commission seeks comment on the availability of any technological tools that may allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or recognize wireless numbers that have been assigned from a pool of numbers

---

[2] *Notice* paras. 1, 11 and 49.
[3] *See* 47 U.S.C. § 227.
[4] *Notice*, paras. 1 and 11
[5] *Id.,* paras. 1 and 14.
[6] WorldCom, however, does not support DMA's proposed standard for a maximum setting on the abandonment rate of predictive dialers, in particular the time period over which the rate should be measured. *See infra*, pp. 43-44. Additionally, the Commission seeks comment on the Attorneys General interpretation of state authority to regulate telemarketing calls originating outside of the state. *Notice*, para. 63. WorldCom supports the comments DMA is filing today on this matter. States do not have jurisdiction to apply state laws regarding telephone solicitations to interstate calls.
[7] As discuss in second half of these comments, WorldCom supports a reduction in the ten-year retention requirement on company-specific lists. *See infra*., p. 40.

that formerly were all wireline.[8] It is WorldCom's view that the time is not ripe to assess, or address, the impact that number portability and number pooling may have on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA.

THE COMMISSION SHOULD NOT ADOPT A NATIONAL DO-NOT-CALL LIST

In its *Notice* the Commission seeks comment on whether it should revisit the option of establishing NDNC list.[9] WorldCom opposes the adoption of a NDNC list for the reasons discussed below.

I. THE DISADVANTAGES OF A NATIONAL DO-NOT-CALL REGIME VASTLY OUTWEIGH ANY ADVANTAGES SUCH A SYSTEM OFFERS.

In determining whether to adopt NDNC, pursuant to the TCPA, the Commission must undertake a full and thorough evaluation, considering all advantages and disadvantages of such a regime.[10] The disadvantages are substantial. NDNC poses a negative impact on the economy and the competitiveness of the telecommunications market and still poses cost, accuracy and privacy concerns. The potential benefits of such a list are indeterminate, and there already exists a practical mechanism for consumers to prevent unwanted telephone solicitations.

Telemarketing, under the Commission's current regulations, is a cost-effective tool for companies to introduce new products, services, and service providers into the

[8] *Notice*, para. 46.
[9] *Notice* paras. 1, 11 and 49.
[10] "The proceeding shall *compare and evaluate* alternative methods and procedures…for their effectiveness in protecting such privacy rights, and in terms of their cost *and other advantages and disadvantages*." 47 U.S.C. 227(c)(1)(A)(emphasis added).

marketplace. It provides consumers access to goods and services that are not generally sold in the retail market, such as telecommunications. As such, telemarketing is beneficial to companies and consumers alike. The benefit to consumers is evident by its success. In general, telemarketing generates *hundreds of billions* of dollars a year in sales.[11] It accounts for approximately one third of the direct sales in the United States.[12] Consequently, curbing this form of marketing could have a dramatic negative impact on the economy.

Moreover, telemarketing is critical for vigorous competition in the telecommunications industry. As discussed below[13] and in the attached exhibits, telemarketing provides new entrants a cost-effective means to inform consumers of their choices in local and long distance providers and services and instigates zealous price competition.[14] Additionally, due to the statutory exemption for companies with an existing business relationship, NDNC will provide incumbents a considerable competitive advantage. With the advent of local telecommunications competition, it is now more important than ever for the Commission to recognize the value of telemarketing and to refrain from imposing undue burdens or costly regulations on the practice.

Furthermore, in its initial evaluation of the costs and benefits of creating a NDNC database the Commission determined that the disadvantages outweighed any possible

[11] *See Notice*, para. 7; *See also*, Comments of the Direct Marketing Association, Inc. and The U.S. Chamber of Commerce, Before the Federal Trade Commission, FTC File No. R411001, p.5 (filed Apr. 15, 2002)("DMA Joint Comments to the FTC").
[12] *Notice*, para. 7.
[13] *Infra*., p. 6
[14] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, CC Docket No. 92-90, Separate Statement of Chairman Michael K. Powell (Sept. 12, 2002). ["We also seek to empower consumers directly by providing them information they can use to make educated decisions in a marketplace where the options can sometimes be daunting."]

advantages.[15] The Commission concluded that a national database would be costly, difficult to establish and maintain in a reasonably accurate form, and posed a risk of misuse of consumer information by unscrupulous entities.[16] The Commission also determined that a government-sponsored no call database was contrary to the public interest.[17] As discussed below,[18] the record does not reflect that the Commission's previous concerns regarding cost, accuracy and privacy have been alleviated, or that a government-sponsored no call list would be in the public interest.

The Commission states in its *Notice* that it has received TCPA-related complaints and inquiries.[19] The Commission, however, does not discuss how these complaints relate to a lack of NDNC, or how they would be remedied by such a regime. It appears the primary, if not the *only*, advantage NDNC offers over company-specific lists is that "it might provide consumers with a one-step method for preventing telemarketing calls."[20] Yet it is not clear that the majority of consumers demand this one-step method. In fact, a recent survey of residents in states with government-sponsored DNC lists revealed that, of the respondents aware of their state's DNC list, the majority of households chose not to register on the list.[21]

Lack of material burden to consumers in having to repeat a do-not-call request on a case-by-case basis is also indicated by the fact that, in states that have initiated general no call lists, the inclusion of a nominal registration fee is enough to dissuade subscriber

---

[15] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, FCC 92-443, para. 14 (rel. Oct. 16, 1992)(*TCPA Order*).
[16] *Id.*
[17] *Id*., para. 14, n. 24.
[18] *Infra.*, p. 16.
[19] *Notice*, para. 49, n. 177.
[20] *Notice*, para. 49.
[21] Michael A. Turner, Ph.D., Information Policy Institute, "Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices," Final Report, p. 30 (Jun. 4, 2002)("IPI Report").

enrollment.[22] Although the Commission is precluded by statute from imposing a fee on consumers, such unwillingness to pay a nominal fee for list participation denotes a lack of considerable consumer benefit from such regimes. Clearly the convenience of a one-step method does not outweigh the substantial benefits telemarketing brings in the form of consumer information on new products and service offerings, price reductions, and more vigorous competition in general, let alone overcome the costs, accuracy and privacy concerns posed by a NDNC list.

As discussed in second half of these comments,[23] company-specific do-not-call lists are a viable mechanism for consumers to prevent unwanted telephone solicitations and offer significant advantages over NDNC to both consumers and telemarketers. The current company-specific system allows consumers to pick and choose which companies call them. It also affords companies an effective means to introduce customers to their products and services, which is critical in emerging markets, while protecting consumers from repeat calls if the consumer requests no further contact from a company. Consumers cannot always anticipate all of the products, services or price reductions they may learn of via telephone solicitations, but when they are provided an offer that interests them, consumers respond favorably to, and benefit from, that telephone solicitation. This is evident by the fact that, according to a recent survey, one-half of the households surveyed acquired at least one product or service over the telephone in the past year, with

[22] In Florida and Georgia, states that require yearly fees for registering a household on the DNC list, only 4-14% of the households *aware* of the state DNC list registered. IPI Report, pp. 30-31. *See also,* Comments and Recommendations of the Attorneys General of Alabama *et al*, Before the Federal Trade Commission, FTC File No. R411001, p. 22. ("AG Comments to the FTC") ["To the extent that a state may currently require a small registration fee we are concerned that any additional fee will serve only to dissuade registration in the Commission's registry."] *See also*, T. Randolph Beard, PH. D., "Telemarketing and Competition: An Economic Analysis of 'Do Not Call' Regulations," pp. 4-5, n. 3 (March 2002). ["Participation appears to be very low in those states that charge for the service."]

[23] *Infra*., p. 38.

the vast majority reporting satisfaction with the experience.[24] In fact, even some of those that placed their number on a state do-not-call list purchased an item via telemarketing.[25]

A. A NATIONAL DO-NOT-CALL REGIME WILL SEVERELY HINDER COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY, HARMING TELECOMMUNICATIONS CONSUMERS.

The telecommunications market has unique aspects that make telephone solicitations particularly suitable to telecommunications sales and consequently advantageous to telecommunications consumers. According to a recent survey, the main reason respondents provided for being unlikely to purchase over the phone was not privacy, rather it is an inability to see what they purchase.[26] This factor is not applicable to telecommunications services. As discussed below, in purchasing telecommunications services, direct contact to discuss the various options, features and plans is most crucial. This may explain why telephone services are the second most commonly acquired product or service purchased over the phone.[27] Telephone solicitations are the primary mechanism for, and the means by which consumers are accustomed to, purchasing competitive telecommunications services. The majority of customers who switch service to MCI, a wholly owned subsidiary of WorldCom that sells residential telecommunications services, do so in response to telemarketing efforts.

---

[24] IPI Report, pp. 4-5 and 17. Although the report, at least at one point, refers to "inbound telephone solicitations," the authors meaning is clarified by statements such as "organizations…*telephoning into* households" and "any company… that *has telephoned*…" *Id*. (emphasis added).
[25] *Id*., p. 6. *See also, id*., p. 16. ["[T]he acquisition of products or services as a result of telephone solicitations from a national company with whom the respondent did not otherwise do business is slightly reduced for households who are on (16%) …a state do not NDC list."]
[26] IPI Report, p. 4.
[27] *Id*., p. 3.

Moreover, as opposed to other products and services, the consumers' needs for which are unknown, every household that receives a telephone solicitation is necessarily a purchaser of telephone services. Thus, it is exceedingly more likely that the consumer will be interested in, and benefit from, the information provided during a telephone solicitation related to competitive telephone services.

Furthermore, a significant change since Congress and the Commission first considered a NDNC is the advent of competition in the formerly monopolized local telephone markets and the allowance of the Regional Bell Operating Companies into the long distance market. This is the result of the Telecommunications Act of 1996, which Congress adopted subsequent to the TCPA, which tasked the Commission with promoting competition in all sectors of the telecommunications industry. The Commission cannot ignore the detrimental impact of a NDNC regime on competition in the telecommunications industry. As discussed below, NDNC will 1) inflict an extreme burden on new entrants of the still exceedingly monopolized local market; 2) diminish telecommunications price competition; and 3) grant incumbents an enormous marketing advantage over competitive providers due to the statutory exemption for companies with an existing business relationship.

Considering these unique circumstances and potentially devastating consequences, the Commission should refrain from imposing a NDNC regime on common carriers.

(1). A NATIONAL DO-NOT-CALL REGIME WILL BE DETRIMENTAL TO LOCAL MARKET ENTRY.

Local competition is finally emerging. Consumer demand for competition is evident by the 2.4 million local customers subscribed to MCI across forty states and the District of Columbia since it launched local service in New York four years ago.[28] Competition in the local market not only lowers prices, it allows for unique packaging of telecommunications services such as MCI's new, and notably popular, Neighborhood product. The Neighborhood is an innovative all-distance telecommunications product that combines a special feature package and unlimited local and long distance calling for one price.

Continued expansion of local competition, and the associated benefits to consumers, is dependent on consumer awareness of their choices. Transforming a monopoly market into a competitive one is a difficult endeavor. One key obstacle is that consumers are accustomed to the well-known incumbent provider and its services, and many may not even be aware of their new options. Therefore, carriers not only need to be able to technically provision service they must also be able to *effectively* market their new service offerings. As discussed in the attached declaration of Andrew Graves, Exhibit A, telemarketing is the most cost-effective way to introduce new products and services to the public, especially local and long distance telecommunications services that customers customize for their specific needs.[29] The dramatic impact of telemarketing on opening previously monopolized telecommunications markets was demonstrated with MCI's entry into the long distance market after the divestiture of AT&T, which is now being repeated with MCI's new integrated product, The Neighborhood. The majority of subscribers to The Neighborhood signed up through telemarketing. Incredibly, this sales

[28] *See* Exhibit A, Declaration of Andrew Graves, para. 3. Note, MCI had previously attempted to enter the local market in California.

channel enabled MCI to welcome over a half a million customers within just eight weeks of introducing the product.[30]

The cost and extent of NDNC could force companies to cease telemarketing altogether and, as a result, deprive all consumers of this familiar and cost-effective vehicle for obtaining information about competitive products and service offerings. Even if telemarketing were to survive the implementation of NDNC, many consumers electing to be included in the national database would be denied valuable information. It is important to recognize that consumers cannot anticipate all the offerings or information they will receive via telemarketing. For example, the vast majority of consumers do not know that they have a choice in their local service provider. A NDNC list would mean that some consumers will never learn that they have a choice in local service providers, stopping local competition before it ever gets started.[31]

MCI's experience with state do-not-call regimes demonstrates that these lists critically limit a carrier's ability to introduce residential consumers to its attractive competitive offers, thereby hindering the expansion of local competition and consumer choice. MCI performed a comparison of its local penetration in states that had state do-not-call lists that were applicable to MCI and states that did not have such a regime, using pairs of similarly sized states where MCI service was launched at the same time. The analysis showed that MCI's local market penetration is up to 60% higher in the states without a state do-not-call list.[32] It is a grave misfortune for the consumers in states

[29] Graves, paras. 4-5.
[30] *See id.*, paras. 3-4.
[31] *Id*., paras. 6-7.
[32] *Id.*

which have such lists that they are being denied or delayed access to valuable information on unanticipated yet potentially welcomed new and innovative products and services.

(2). A NATIONAL DO-NOT-CALL REGIME WILL DIMISH THE BENEFITS OF "INFORMATIVE ADVERTISING" AND PRICE COMPETITION THAT TELEMARKETING OFFERS.

Telemarketing provides telecommunications consumers a substantial benefit by providing service and product information that is pertinent to a particular individual and by stimulating vigorous price competition. The Commission already concluded that consumers reap significant benefits when telecommunications marketing is personalized.[33] Moreover, it is virtually indisputable that consumers benefit from price competition.

Attached hereto as Exhibit B is an economist's report on the negative impact of a national no call list on the telecommunications industry, which the DMA and Chamber of Commerce submitted with their joint comments to the Federal Trade Commission.[34] The report discusses the benefits of advertising to the competitive process in general and emphasizes the significance of telemarketing to competition in the telecommunications industry in particular. "[I]n some important cases, advertising increases competition, lowers prices, and benefits the public."[35] Specifically, the report distinguishes between "informative" advertising and "persuasive" advertising. Persuasive advertising can be

[33] *See* Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Dockets 96-115, 96-149, and 00-257, FCC 02-214, para. 35 (Jul. 25, 2002)("CPNI Third Report and Order"). ["Customers are in a position to reap significant benefits in the form of more personalized service offerings…based on the CPNI that the carriers collect."] Direct contact with the customer, via telemarketing, assists the sales representative in determining the consumer's needs when CPNI is not available.
[34] *See* Exhibit B. T. Randolph Beard, PH. D., "Telemarketing and Competition: An Economic Analysis of 'Do Not Call' Regulations" (March 2002).
[35] Beard, p. 6.

characterized as advertising that "seeks to alter preferences."[36] For example, the use of a celebrity may prompt a consumer's desire in a product or service. "Informative" advertising, on the other hand, informs consumers of important features of the product or service such as price. "In general, economist view price advertising as beneficial to consumers and oppose restrictions on it."[37]

Telemarketing, particularly in the telecommunications industry, clearly falls in the latter category. Telemarketing calls advertising telecommunications services stress price reductions, free minutes, cash awards, new bundling arrangements, additional service offerings and other important information on features and functions that consumers need to make educated choices regarding their provider of telecommunications services.[38] Telemaketing allows consumers to ask questions and obtain the information needed to choose the service that fits their individual needs, and provides a simple means to subscribe to those services. Other forms of telecommunications advertising are directed at the public in general and therefore may not provide the information most pertinent to a particular user.

In addition to being a cost-effective means to provide consumers information on offerings and services, telemarketing enables carriers to target customers of rivals, which ultimately results in vigorous price competition like that experienced in the long distance telephone market. Since virtually everyone subscribes to a telephone service, a sales call to a non-customer is necessarily a solicitation to the customer of a rival. Since telemarketing is the most cost-effective means of "raiding" the customer base of a rival

[36] *Id*.
[37] *Id.*
[38] Beard, p. 7. Graves, para. 5.

carrier,[39] it " . . . appears responsible for most customers switching between carriers in response to offered price reductions."[40] Moreover, in order to prevent the loss of a customer as a result of a telemarketing call by a rival, the customer's current carrier continuously monitors its current prices and offerings to ensure they remain attractive. "Thus, any policy that limits such calls will have the unintended consequence of raising the costs incurred by firms in making attractive offers to rival firms' customers. This cost increase, in turn, reduces the incentives firms have to 'guard' their initial customers by moderating prices."[41] Consequently, limitations on telemarketing calls are likely to result in increased telecommunication prices.

Consumers making decisions as to whether to get on a general do-not-call list may consider the direct cost to them, such as the fee for inclusion on the lists, but are unlikely to consider or to even be aware of the indirect costs, e.g., consequential price increases. Nevertheless, the Commission must factor in these inevitable price increases in its evaluation of the costs and benefits of a NDNC list. Consumers may get tired of telemarketing calls, but at the same time they love the low rates, free minutes, and all the other promotions.[42]

(3). A NATIONAL DO-NOT-CALL REGIME WILL DISRUPT THE COMPETITIVE BALANCE.

A NDNC will favor incumbent providers. This is because in the TCPA Congress excluded from regulation calls to persons with whom the company had an established business relationship.[43]

---

[39] Beard, pp. 6-8.
[40] *Id*., pp. 16-17. *See also, Id*., p. 1.
[41] *Id*., p. 1.
[42] *See*, *id*, p. 12. *["[W]hile some people object to sales calls, virtually everyone objects to higher prices*.](emphasis in original). *See also*, Graves, para. 12.
[43] *See* 47 U.S.C. 227(a)(3)(B) and 47 U.S.C. 227(3).

MCI is unique among the major telecommunications players, in that every one of its customers chose its services, largely as a result of MCI's telemarketing efforts. AT&T, on the other hand, still maintains a large portion of the residential long distance customers as a result of its previous incumbency. Most significantly, incumbent local exchange carriers (ILECs) maintain nearly 90% of the local customer base.[44] These carriers would virtually be exempt from the effects of NDNC within their incumbent region. As a result, NDNC would have virtually no impact on the ILECs' ability to telemarket new services, such as long distance services, in-region. AT&T will also have a significant advantage over other new entrants to the local market as a result of its large long distance customer-base. Meanwhile, a carrier with no history of incumbency, that consequently lacks the associated sizable customer-base, will be significantly more restricted in marketing their service offerings.

Thus, incumbents will have more flexibility in their marketing campaigns, in particular the ability to use the most cost-effective and personal marketing tool for competitive telecommunications sales, while new entrants will be force to use more costly and less effective mechanisms. This places new or smaller competitors at a substantial marketing disadvantage to incumbents that already have the lion's share of advantages.

The Commission has proposed a definition of "established business relationship" that would limit that relationship to the customer's current services.[45] Depending on how narrow a definition of "service" the Commission is contemplating, this could mean that a

[44] "Local Telephone Competition: Status as of December 31, 2001," Industry Analysis and Technology Division Wireline Competition Bureau, Federal Communications Commission, p. 1 and Table 1 (Jul. 2002).
[45] *Notice*, para. 20.

telecommunications provider would not be able to contact its long distance customers, who become national no call list participants, to discuss local service when those customers are not currently subscribed to local service. This proposed definition, which conflicts with the TCPA, would not adequately cure the advantage to the incumbent, and is not in the public interest.

Companies must have flexibility in communicating with their customers not only about their current services, but also to discuss available alternative services or products they or their affiliates offer.[46] Informing customers about *new* service offerings is an important function of customer service that some consumers expect, especially from their telecommunications provider. Congress clearly recognized this need and accordingly specifically excluded "a call or message . . . to any person with whom the caller has an established business relationship…" from the definition of "telephone solicitation" in the TCPA.[47] By statute, NDNC would only be applicable to "telephone solicitations."[48] Thus, while the TCPA grants the Commission the authority to establish a NDNC list that restricts *who* a company without a established business relation is permitted to call, the

[46] The potential for MCI to contact its customers by phone has not been viewed unfavorably. Jane Bryant Quinn, "Long Distance Relationship is Changing," Contra Costa Times , July 30, 2001[MCI says you'll get a separate notice of every change in writing, *by phone* or by e-mail with your consent. *Good deal*."] *reprinted in* Washington Post, p. H2 July 29, 2001, as "FCC Bows Out of Long Distance Picture", Baltimore Sun, p. 3D, July 30, 2001 as "New Day for Long Distance Users After August 1, and San Francisco Chronicle, p. D1, July 21, 2001 as "Long distance carriers required to come clean with customers"(emphasis added); *See also*, Paul Davidson, "States may take on long-distance firms. At issue: How consumers find out about rate increases," USA TODAY (Jul. 27, 2001)["MCI is the only big carrier vowing to contact consumers directly in writing or *by phone*." (emphasis added.)]

[47] 47 U.S.C. § 227(a)(3).

[48] 47 U.S.C. § 227(c)(3). [The Commission is authorized to establish "…a single national database to compile a list of telephone numbers of residential subscribers who object to receiving *telephone solicitations*…"](emphasis added.)The Commission seeks comment on the interplay between sections 222 and 227. In particular, the Commission asks if a carrier must refrain from contacting a customer by phone, if that customer places her name on a national do-not-call list, even if she gave her carrier opt-out consent with regard to the carrier's use of her CPNI. *Notice*, para. 19. The customer's carrier of choice is exempt from the NDNC ban because of the existing business relationship, regardless of whether or not it received opt-out consent for use of CPNI by the customer.

Commission does not have the authority to restrict or proscribe what is discussed on a call permissible under the TCPA.

Moreover, even assuming *arguendo* the Commission could limit permissible calls to those that have some purpose related to the customer's current service, such a limitation does not make sense in a market where products are increasingly integrated, e.g. The Neighborhood. An enhanced version of a customer's current service is likely to include additional services. Furthermore, as the Commission found in its most recent CPNI decision, customers want to be advised of services that their telecommunications providers offer such as "innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits."[49] The Commission should be encouraging carriers to provide their customers such information, not making it more burdensome or costly.

Accordingly, the Commission should continue with a company specific regime, which allows a consumer to restrict calls from a particular company regardless of an existing business relationship, rather than a national do not call list.

B. THE COMMISSION'S PREVIOUS CONCERNS WITH A NATIONAL DO-NOT-CALL REGIME HAVE NOT BEEN ADDRESSED.

When an agency changes its decision on a matter, the agency must not only provide a reasoned analysis for its new decision, it must specifically address the reason for the divergence from its prior decision.[50]

---

[49] *CPNI Third Report and Order*, paras. 35-36.

[50] Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2233, 29 L. Ed. 701 (1971); *accord* Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). Fox TV Station, Inc. v. FCC, No. 00-1222 (D.C. Circuit February 19, 2002).

In determining the most appropriate means to protect consumers from telephone solicitations to which they object, the Commission, in accordance with the TCPA,[51] compared and evaluated alternative methods and procedures in terms of their effectiveness, costs and other advantages and disadvantages. Upon careful consideration of the cost and benefits of creating a national do-not-call database, the Commission determined that the disadvantages of such a system outweigh any possible advantages. "A national database would be costly and difficult to establish and maintain in a reasonably accurate form."[52] The Commission also found that such a list posed a risk of making consumer information available to unscrupulous entities.[53]

First, the Commission's concerns with accuracy have not been resolved. Nearly one-fifth of all telephone numbers still change subscribers each year.[54] Given this high turnover in telephone numbers, mechanisms must be in place to ensure the number listed is still associated with the person that registered on the DNC list. Frequent updates and renewals, which would be costly, would be necessary to maintain an accurate list. Some form of verification would also be necessary to ensure that it is the subscriber who is placing a number in the database. The importance of accuracy in maintaining the list cannot be underestimated since inaccurate data potentially denies information to persons who did not elect to be place on the list. It could also result in telemarketing calls to those who would have an expectation of receiving no calls.

Second, there is no evidence that the cost of developing and maintaining the database has diminished since the Commission last evaluated this issue. As the comments of the

[51] *See* 47 U.S.C. 227(c)(1)(A).
[52] *TCPA Order*, para. 14.
[53] *Id*., para. 15. The Commission was also concerned with the inability to protect telemarketer proprietary information. *Id.*

Attorneys General to the FTC noted, "states that have established No Call database systems have done so at considerable expense."[55] The Attorneys General expressed concern that the FTC's initial five million dollar estimate would "not be adequate to create the database, much less to cover the costs of maintenance and enforcement, even assuming significant state assistance in that endeavor."[56] They also cautioned that state experience has demonstrated that charging modest fees to companies engaged in telemarketing for access to the "do not call" list could off-set, but is unlikely to fully cover, the ongoing costs of the database systems.[57] As DMA pointed out in its comments to the FTC, it is unclear how the FTC arrived at its estimated costs.[58] Yet, even if the FTC accurately estimated the cost of collecting name and number in an automated manner, it is far more expensive to compile a list that is capable of being accurate and authenticated.[59]

Third, it is unclear that the Commission's previous concern with protecting consumers' private information has been addressed. Merely prohibiting companies from using the consumer information contained in the database for purposes other than compliance with the no call regulations was an option for the Commission in 1991. In fact such a prohibition is mandated by the TCPA.[60] Still, as the Commission previously

---

[54] *See* DMA Joint Comments to the FTC, p. 12. *See also*, Notice, para. 51; *See also TCPA Order*, para. 12.
[55] AG Comments to the FTC, p. 12. "States implementing No Call database systems have incurred significant expenditures in establishing computerized databases, the corresponding personnel and other equipment and location expenses, and in consumer education." *Id*., p. 25.
[56] *Id*., p. 25
[57] *Id.,* p. 22.
[58] DMA Joint Comments to the FTC, p. 13.
[59] *Id*.
[60] 47 U.S.C. 227(c)(3)(K).

determined, a NDNC database poses the risk of unscrupulous telemarketers misusing consumer information contained in the database.[61]

Finally, if the Commission were to adopt a NDNC list it would have to evaluate the categories of public and private entities that would have the capacity to establish and administer the database.[62] The Commission previously concluded "that any [NDNC] database would not be a government sponsored institution and would not receive federal funds or a federal contract for its establishment, operation, or maintenance."[63] Accordingly, the use of a FTC no call database would be contrary to the Commission's previous decision not to have a government sponsored NDNC database, and would raise other concerns as discussed in section III below. And considering the Commission has not presented an alternative do-not-call regime, the Commission must give another opportunity to comment on any new proposal.

II. IMPLEMENTATION OF THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD IMPOSE UNCONSTITUTIONAL RESTRICTIONS ON FREE SPEECH.

The Commission has invited comments on whether a national do-not-call database would satisfy the standards articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).[64] The Commission's proposed national do-not-call database is fundamentally incompatible with the First Amendment and *Central Hudson* because its disparate treatment of commercial and noncommercial speech bears no relationship whatsoever to the government's asserted

[61] *TCPA Order*, para. 15.
[62] 47 U.S.C. § 227(c)(1)(B).
[63] *In the Matter of the Telephone Consumer Protection Act*, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, para. 29 (Apr. 10, 1992). The Commission affirmed its tentative conclusion. *TCPA Order*, para. 14, n. 24.
[64] *See Notice,* para. 50.

interest in protecting consumer privacy and because it is not narrowly tailored to meet that interest.

In *Central Hudson*, the Supreme Court established a four-part test for analyzing the constitutionality of a content-based commercial speech regulation: *First*, to warrant any First Amendment protection, the regulated speech must concern lawful activities and not be misleading.[65] *Second*, for the regulation to be upheld, the asserted government interest in restricting the speech must be substantial. *Third*, the government must show that its speech restriction directly and materially advances the asserted government interest. *Fourth*, the government must narrowly tailor its restriction to the asserted interest, so that there is a reasonable fit between the two.[66] "[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."[67] The third and fourth prongs form the heart of the *Central Hudson* analysis.

The first step of *Central Hudson* requires little discussion. The telemarketing calls that are subject to the Commission's proposed national do-not-call regime seek to offer truthful, non-misleading information about a lawful commercial transaction. (To the extent the calls are fraudulent, they can be regulated without First Amendment objection under federal and state fraud provisions.)

Even assuming that the Commission's asserted interest in residential privacy is considered substantial under the second part of the *Central Hudson* test,[68] the

[65] *See* 447 U.S. at 566; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).
[66] *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).
[67] *Central Hudson*, 447 U.S at 564.
[68] *See Notice,* para. 1. Although freedom from unwanted solicitations may rise to the level of a substantial state interest when the solicitations are "pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993), "the government cannot satisfy the

Commission has not met its burden of satisfying parts three and four of the *Central Hudson* analysis - whether the regulation directly and materially advances the government's privacy interest, and whether it is narrowly tailored to further the government's asserted goals.[69]

A. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD DISCRIMINATE BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The Commission states that it is revisiting the question of whether to adopt a national do-not-call database due to "[p]ersistent consumer complaints regarding unwanted telephone solicitations."[70] The Commission's principal concern is the need to protect "consumer privacy."[71] The proposed database, however, would not protect consumers from all unwanted telephone solicitations because its application is limited to certain commercial calls.[72] Although the national do-not-call database purports to regulate all "telephone solicitations,"[73] the TCPA's definition of "telephone solicitation" excludes calls from nonprofit organizations: "a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, . . . but such term does not include a call or message . . . to any person with whom the caller

---

second prong of the *Central Hudson* test by merely asserting a broad interest in privacy." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234-35 (10th Cir. 1999). "When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest. . . . It must specify the particular notion of privacy and interest served." *Id.* at 1234-35. The need for the government to make this showing is particularly strong given that we live in an open society in which information is exchanged freely. *Id.* at 1235. The Commission has asserted that it has received numerous consumer complaints about unwanted telephone solicitations. *See Notice,* n. 177. It has not, however, demonstrated that such solicitations are so vexatious or intimidating that their prevention constitutes a substantial state interest.

[69] *See Discovery Network*, 507 U.S. at 416, 417 n.13; *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

[70] *Notice,* para. 49.

[71] *Id.* para. 1.

[72] *See id.* para. 56 ("The Commission has concluded, however, that its regulations under the TCPA apply only to commercial calls.").

has an established business relationship, or . . . by a tax exempt nonprofit organization."[74] The exemption for nonprofit organizations "applies to religious and political organizations that have likewise received tax exempt status from the U.S. government" and "extends to telephone solicitations made by telemarketers on behalf of tax-exempt nonprofit organizations."[75]

The national do-not-call database would therefore be fatally underinclusive. It would regulate some commercial calls, but would exempt all noncommercial calls, including solicitations by telemarketers on behalf of nonprofit organizations. The disparate treatment of commercial and noncommercial calls does not withstand First Amendment scrutiny. The Constitution demands a "reasonable fit" between a speech-restrictive regulation and the government's asserted goal,[76] such that the challenged regulation advances the government's interest "in a direct and material way."[77] A fundamental mismatch between the government regulation and its purported goal calls into question the sincerity of the government's proffered justification and raises the specter that the government simply prefers some speakers to others.

Indeed, the Supreme Court struck down a regulation that drew a comparable distinction between commercial and noncommercial speech. In *Discovery Network*, a city ordinance banned commercial newsracks but permitted noncommercial newsracks on sidewalks. The Court acknowledged that the city's concerns about the safety and aesthetics of its sidewalks were legitimate, but concluded that those concerns applied equally to commercial and noncommercial newsracks: "all newsracks, regardless of

---

[73] S*ee id.* paras. 1, 50,
[74] 47 U.S.C. § 227(a)(3).
[75] *Notice* paras. 33, 56.
[76] *See Discovery Network*, 507 U.S. at 417 n.13.

whether they contain commercial or noncommercial publications, are equally at fault."[78] As the Court noted, the banned commercial newsracks were "no greater an eyesore" than the noncommercial newsracks permitted to remain on the city's sidewalks.[79] In the absence of a distinction between the commercial and noncommercial newsracks that related to the city's interests, the Court refused to recognize the city's "bare assertion that the 'low value' of commercial speech" justified the categorical ban on commercial speech.[80] The Court explained that the city placed "too much importance on the distinction between commercial and noncommercial speech," and that "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests."[81]

The Court's analysis applies with equal force to the Commission's proposed national do-not-call database. The distinction between commercial and noncommercial telephone calls in the proposed do-not-call database is entirely unrelated to the Commission's core concern of protecting consumer privacy. Like the newsracks in *Discovery Network*, all telephone solicitations, regardless of whether they are commercial or noncommercial, "are equally at fault" for intruding upon consumer privacy.[82] The alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a contribution to a charity or from a company offering services. Nothing suggests that the Commission believes that the prohibited calls are more invasive of privacy than the non-prohibited calls, and nowhere in the *Notice* does the Commission

---

[77] *Edenfeld v. Fane*, 507 U.S. at 767.
[78] *Discovery Network*, 507 U.S. at 426.
[79] *Id.* at 425.
[80] *Id.* at 428.

even purport to justify the regime's distinction between commercial and noncommercial calls on this basis. Nor could it, for the alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a donation to a charity, a company introducing new services, or a landscaping company offering a special deal for mowing a lawn.

The court reached the same conclusion in *Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993), in which a federal district court enjoined enforcement of a New Jersey ban (absent the called party's consent) on automated commercial calls. Applying intermediate scrutiny and relying heavily on *Discovery Network*, the court held that the government's interest in preserving the privacy of the home, while valid, was not furthered by banning only commercial calls because both commercial and noncommercial calls "equally disrupt residential privacy"[83]; nor was it furthered by prohibiting only prerecorded calls, because such calls threaten the privacy of the home just as much as live calls.[84] The absence of any evidence that the calls subject to the do-not-call list are any more invasive of privacy than noncommercial calls is dispositive of the First Amendment analysis.

Moreover, the fact that the national do-not-call database would provide a blanket exemption for all noncommercial calls directly "undermine[s] and counteract[s]" the

---

[81] *Id.* at 424 (emphasis in original).
[82] *Id.* at 426.
[83] 837 F. Supp. at 651.
[84] *Id.* at 653. *See also Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369-70 (9th Cir. 1997) (striking down ordinance regulating only for-profit vendors along boardwalk because there was no evidence that they "are any more cumbersome upon fair competition or free traffic flow that those with nonprofit status"); *Anabell's Ice Cream Corp. v. Town of Glocester*, 925 F. Supp. 920, 928-29 (D.R.I. 1996) (striking down on *Discovery Network* grounds ordinance prohibiting use of outdoor loudspeakers by merchants but not by nonmerchants).

government's interest in protecting consumer privacy from telephone solicitations.[85] Because consumers would continue to receive noncommercial calls, including calls from telemarketers on behalf of nonprofit organizations, there is "little chance" that the national do-not-call database "can directly and materially advance its aim."[86]

The Seventh Circuit's opinion in *Pearson v. Edgar*, 153 F.2d 397 (7th Cir. 1998), is directly on point. That case involved an Illinois statute that made it unlawful for a real estate agent to solicit a sale or listing of property from any owner who had indicated a desire not to sell the property. Relying heavily on *Discovery Network*, the Seventh Circuit held that the no-solicitation list at issue was impermissibly underinclusive and thus violated the First Amendment.[87] The Court held, for example, that because "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy," the speech restriction did not "reasonably fit" the reason for the restriction.[88] Similarly, in the absence of evidence that the real estate solicitations at issue were particularly invasive, "a mechanism whereby homeowners can reject real estate solicitations but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'"[89] Finally, in light of the Supreme Court's commercial speech cases, the Seventh Circuit disclaimed the ability to "place the

[85] *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking down ban on disclosure of alcohol content on beer labels where same information was allowed on labels of wines and spirits); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 189-90 (1999) ("*GNOBA*") (striking down statute prohibiting advertising of private casino gambling, but allowing advertising of state and Indian tribe gambling, given that "any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling").
[86] 514 U.S. at 489; *see also Central Hudson*, 447 U.S. at 564 ("[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.").
[87] 153 F.3d at 402-05.
[88] *Id.* at 404.
[89] *Id.* at 404 (quoting *Edenfield*, 507 U.S. at 767).

interest in residential privacy above the interest in logical distinctions in speech restrictions."[90]

B. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD VIOLATE THE FIRST AMENDMENT BECAUSE IT IS MORE EXTENSIVE THAN NECESSARY TO SERVE THE GOVERNMENT'S INTEREST IN CONSUMER PRIVACY.

A restriction on commercial speech may not be "more extensive than necessary to serve the interests that support it."[91] The government must show that its interests cannot be protected by a more limited regulation of speech,[92] and bears the burden of demonstrating that a regulation has been narrowly tailored to the asserted governmental interest.[93] The Supreme Court has "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[94] Accordingly, the Court has not hesitated to strike down regulations of commercial speech that were more extensive than necessary to serve the government's asserted interests.[95]

The Commission could implement alternative regimes to protect consumer privacy that would restrict less speech. For example, company-specific do-not-call lists, which protect consumer privacy by requiring telemarketers to place a consumer on the company's list if the consumer asks not to receive further solicitations, strike a better

---

[90] *Id.* at 404. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
[91] *GNOBA*, 527 U.S. at 188.
[92] *Central Hudson*, 447 U.S. at 570
[93] *GNOBA,* at 183, 188.
[94] *Thompson v. Western States Med. Ctr.*, 122 S.Ct. 1497, 1506 (2002).
[95] *See, e.g., Rubin*, 514 U.S. at 490-91 (holding law prohibiting display of alcohol content on beer labels unconstitutional in part because of availability of less restrictive means of advancing government's interests); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (striking down prohibition on advertising the price of alcoholic beverages in part because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"); *Central Hudson*, 447 U.S. at 570-71 (striking down regulation banning advertising by a utility where "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interest").

balance between consumer privacy and the First Amendment rights of telemarketers. Company-specific lists allow a customer access to information from a variety of sources - including information that the consumer may not have anticipated would interest him - while providing the consumer with an easy mechanism to protect his privacy from unwanted calls. Although the company-specific lists impose a slightly greater burden on the consumer to the extent that the consumer must respond once to each caller (as opposed to responding once by placing his name on the national list), this burden is outweighed by the benefit to the consumer and telemarketer alike of the free exchange of ideas.[96]

Unlike the national do-not-call database, the company-specific lists are narrowly tailored to serve consumer privacy. The national do-not-call database regime paints with too broad a brush. If a consumer receives a telephone solicitation from a local landscaping company and responds by asking to be included on the national do-not-call list, not only will that landscaping company suffer the consequences, but so will every other company that would otherwise call that consumer. In this way, all commercial callers are penalized for the conduct of a single actor, and the First Amendment rights of a wide range of callers are restricted. Such a broad sweep suggests that the Commission has not "carefully calculate[d] the costs and benefits associated with the burden on speech imposed by the regulations."[97] The company-specific lists, by contrast, protect the free speech rights of a company that wishes to disseminate information to a consumer until the consumer makes clear that he does not want to receive information from the

[96] *See, e.g., Central Hudson*, 447 U.S. at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").
[97] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (internal quotation and citation omitted).

company. At the same time, the company-specific lists adequately protect a consumer's privacy because after receiving just one potentially unwanted telephone call, the consumer can prevent all future calls from that company by simply requesting his name be added to the company-specific list.

Other alternatives to the national do-not-call database, such as the use of caller identification devices and services that block calls from unlisted telephone numbers, would likewise adequately protect consumer privacy while at the same time preserve the free speech rights of callers.

C. THE PROPOSED NATIONAL DO-NOT-CALL DATABASE WOULD VIOLATE THE FIRST AMENDMENT TO THE EXTENT IT WOULD MAKE CONTENT-BASED DISTINCTIONS AMONG TYPES OF COMMERCIAL SPEECH.

Finally, to the extent that the Commission's telemarketing rules draw content-based distinctions among types of commercial speech, they are subject to strict scrutiny rather than a *Central Hudson* analysis and are unconstitutional.

"Content-based regulations are presumptively invalid."[98] Indeed, "[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[99]

In *R.A.V.*, the Supreme Court addressed content-based restrictions within categories of "proscribable speech," such as the commercial speech at issue here.[100] The Court noted that "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of

[98] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).
[99] *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n.*, 447 U.S. 530, 536 (1980) (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)).
[100] WorldCom believes that truthful, non-misleading commercial speech is entitled to full First Amendment protection. WorldCom recognizes, however, that although several Justices appear to have embraced that

idea or viewpoint discrimination exists."[101] When the content-based distinctions are *unrelated* to the reason the speech is generally proscribable, however, the Court's oft-noted concerns of the dangers of content-based discrimination remain at the fore.

For example, although a state may choose to prohibit only that obscenity which is "the most patently offensive in its prurience," it may *not* prohibit only that obscenity which includes "offensive political messages."[102] In the commercial speech context, that means that although "a State may choose to regulate price advertising in one industry but not in others because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there,"[103] a State may not prohibit "only that commercial advertising that depicts men in a demeaning fashion."[104]

Courts' more permissive approach toward regulation of commercial speech has been justified principally on the ground that commercial speech is both "more easily verifiable by its disseminator" and less likely to be "chilled by proper regulation."[105] The regulation of commercial speech, therefore, "is limited to the peculiarly *commercial* harms that commercial speech can threaten - *i.e.*, the risk of deceptive or misleading advertising,"[106] and the need to "preserv[e] a fair bargaining process."[107] To the extent

---

position, it is not yet received the support of a majority of the Court. *See generally Lorillard Tobacco Co.*, 533 U.S. at 554-55.

[101] *R.A.V.*, 505 U.S. at 388.

[102] *Id.*

[103] *Id.* at 388-89 (internal citations omitted).

[104] *Id.* at 389; *see also Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring) ("[E]ven when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category."); *GNOBA*, 527 U.S. at 193-94 (Thomas, J., concurring) (noting that, even in the commercial speech context, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment").

[105] *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24; *see also Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring).

[106] *Lorillard Tobacco Co.*, 533 U.S. at 576 (Thomas, J., concurring) (emphasis in original)

that the Commission seeks to draw distinctions among types of commercial speech that are "unrelated to the preservation of a fair bargaining process," the distinctions - "like all other content-based regulation of speech - must be subjected to strict scrutiny,"[108] and cannot survive.

III. ADOPTING A NATIONAL DO-NOT CALL DATABASE IN TANDEM WITH THE FTC'S PROPOSAL TO ESTABLISH SUCH A DATABASE WOULD VIOLATE THE REQUIREMENTS OF THE TELEPHONE CONSUMER PROTECTION ACT.

In January of this year, the FTC issued a Notice of Proposed Rulemaking announcing its decision to reexamine its telemarketing regulations, and requesting comment on a proposal to establish a national database of consumers who do not wish to receive telemarketing calls.[109] The FTC issued subsequent notices to provide additional detail regarding its proposal, and to seek further comments on the implementation of the proposed scheme.[110] In September 2002, this Commission requested comments regarding, inter alia: the propriety of retaining a company-specific approach if the FTC adopts a national database;[111] the extent to which the FCC may act in conjunction with the FTC to develop a national database;[112] the effect of a combination of efforts between

---

[107] *44 Liquormart Inc.*, 517 U.S. at, 501 (Stevens, J., concurring, joined by Kennedy and Ginsburg, JJ.); *see also R.A.V.*, 505 U.S. at 388-89 (noting that "risk of fraud" is "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection"); *Rubin v. Coors*, 514 U.S. at 493 (Stevens, J., concurring) (identifying the "rationales for treating commercial speech differently under the First Amendment" as "the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker").

[108] *Lorillard Tobacco Co.*, 533 U.S. at 577 (Thomas, J., concurring); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000); *R.A.V.*, 505 U.S. at 395.

[109] *Telemarketing Sales Rule*, 67 Fed. Reg. 4492 (FTC Jan. 30, 2002) ("FTC NPRM").

[110] *See Privacy Act; System of Records*, 67 Fed. Reg. 8985 (FTC Feb. 27, 2002); *Telemarketing Sales Rule User Fees*, 67 Fed. Reg. 37362 (FTC May 29, 2002).

[111] *See Notice*, para., 16.

[112] *See id.* para., 49.

the FCC and the FTC; [113] the wisdom of extending the FTC standards to companies subject to the FCC's jurisdiction, and the role the FCC should play in administering the database if it does so;[114] and any concerns that such collaboration would raise, such as an inconsistency between the requirements of the Telephone Consumer Protection Act and the FTC's proposed rules.[115]

As discussed in more detail below, FCC coordination with the FTC raises serious statutory concerns. Because the FTC's proposal conflicts with several aspects of the Telephone Consumer Protection Act ("TCPA"),[116] a wholesale adoption of the FTC's proposed rules would be unlawful. Given that some of the conflicts are inherent to the FTC's proposed regime, these conflicts cannot be cured by adopting regulations that require only partial compliance with the FTC's rules. The FCC therefore lacks the authority to require carriers subject to its jurisdiction to adhere to the FTC's proposed do-not-call rules.

A. THE FCC CANNOT DELEGATE THE ESTABLISHMENT OF A NATIONAL DATABASE TO THE FTC BECAUSE § 227 REQUIRES THE COMMISSION TO CONSIDER CERTAIN ISSUES ITSELF.

It is a fundamental tenet of administrative law that the FCC lacks the authority to deviate from Congress's statutory commands.[117] In this context, Congress adopted section 227 of the TCPA, which both establishes and constrains the FCC's power to adopt rules governing telephone solicitation. In part, section 227 imposes affirmative

[113] *See id.* para., 52.
[114] *See id.* para., 55.
[115] *See id.* paras. 56-57.
[116] 47 U.S.C. § 227.
[117] *See, e.g.*, *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); *Alabama Power Co. v. United States EPA*, 40 F.3d 450, 454 (D.C. Cir. 1994).

duties upon the FCC in the event that it determines that a national do-not-call list should be established. Specifically,

> [T]he Commission shall--
>
> > (A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;
> >
> > (B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--
> >
> > > (i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;
> > >
> > > (ii) reflect the relative costs of providing such lists on paper or electronic media; and
> > >
> > > (iii) not place an unreasonable financial burden on small businesses; and
> >
> > (C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.[118]

These provisions expressly require the FCC to conduct an independent inquiry into the enumerated factors when adopting a national do-not-call list, and do not permit the FCC to delegate fulfillment of that duty to the FTC. Congress has determined that the FCC must consider those issues, and issuing regulations that require carriers subject to the FCC's jurisdiction to adhere to the FTC's rules would not be sufficient to meet those requirements -- even if the FTC itself had evaluated the same or similar factors. This is particularly true given that the FTC's proposed rules have not yet been established, and the Commission cannot, therefore, effectively evaluate the effect that adopting identical rules would have on telemarketers operating in different venues. Thus the Commission

[118] 47 U.S.C. § 227(c)(4).

cannot require companies subject to its jurisdiction to adhere to FTC do-not-call regulations unless, at a minimum, it issues an NPRM specifically seeking comment on whether and how the FTC's final rules, once those rules are adopted, meet the requirements of section 227.

B. THE FCC CANNOT ADOPT THE FTC'S PROPOSED RULES BECAUSE THEY DO NOT MEET THE SUBSTANTIVE REQUIREMENTS OF SECTION 227.

Even if the FCC were able to conduct the analysis required by §227(c)(4) at this time, it could not adopt the FTC's proposed rules because those rules conflict with several of the substantive requirements of section 227.

First, the FTC's proposed rules cover entities on the national do-not-call database that are expressly excluded by section 227. This Commission may establish a national database "to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase."[119] The FTC, in contrast, has proposed rules that are not limited to 'residential subscribers,' but instead sweep more broadly, including outbound telemarketing calls to any "person" who has indicated a desire to be included in the national database (or has expressed a desire not to receive calls from the specific telemarketer).[120] "Person" is defined as "any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity."[121] Thus, on their face the FTC's rules go well beyond those this Commission is authorized to adopt. And although the FTC's proposed rules do exempt some forms of business-to-

[119] 47 U.S.C. § 227(c)(3) (emphasis added).
[120] *FTC NPRM*, 67 Fed. Reg. at 4543 (§310.4(b)(iii)).
[121] *Id.* at 4541 (§ 310.2(u)).

business telemarketing,[122] this partial exemption of calls does not remove all non-residential subscribers from those requirements. Thus, adopting the FTC's proposed rule would exceed the restrictions that section 227 places upon the FCC's authority to regulate telemarketing because it would require companies subject to the FCC's jurisdiction to refrain from making telephone solicitations to businesses and other non-residential telephone subscribers.

The Commission cannot reconcile this conflict between the FTC's proposed rules and section 227 by simply directing the companies subject to its jurisdiction to refrain from calling only the residential subscribers whose names appear in the FTC database, because there would be no practical means of making such a distinction. The NPA-NXXs assigned to a phone number do not themselves indicate whether a telephone number is that of a residential subscriber or a business. Nor has the FTC proposed to include such data with the numbers that are stored in its database.[123] Indeed the FTC has not even explained how potential telemarketers could identify business subscribers in order to comply with its own limited exception for business-to-business calls. Accordingly, so long as the FTC's proposed rules continue to include both residential and non-residential callers in the do-not-call database, the FCC may not lawfully require entities subject to its jurisdiction to use that database.

Adopting the FTC's proposed rules would also unlawfully inject the FCC into the regulation of companies' telephone solicitations of customers with whom the caller has

[122] *See* 67 Fed. Reg. at 4544 (§ 310.6(g)) (exempting "[t]elephone calls between a telemarketer and any business, except calls to induce a charitable contribution, and those involving the sale of Internet services, Web services, or the retail sale of nondurable office or cleaning supplies").

[123] Although the FTC has not yet determined what information would be included in the database, it has only mentioned telephone numbers, the date and time the number was placed on the registry, telemarketing preferences, and other identifying information such as residential zip codes. *See Privacy Act; System of Records*, 67 Fed. Reg. at 8986.

an "established business relationship."[124] Congress has determined that calls to a person with whom the caller has such a relationship should not be considered "telephone solicitation,"[125] and therefore are not subject to the restrictions the TCPA or its implementing regulations place on such solicitations. The FTC, in contrast, has expressly declined to adopt such an exception to its do-not-call rules.[126] The FCC plainly lacks the authority to adopt this aspect of the FTC's proposed rule, and could only lawfully participate in the FTC's do-not-call database if it expressly authorized callers to make this category of calls.

The FTC's proposed rules are also inconsistent with the specific requirements that Congress enumerated in section 227(c)(3). As the Commission recognized in its NPRM,[127] that provision establishes twelve criteria that must be met by any regulations the Commission adopts to establish a national do-not-call database. The FTC's proposed rule fails to meet several of those criteria, and therefore cannot be adopted by the FCC.

For example, the FTC's proposed rules violate section 227(c)(3)(K), which requires any Commission rule adopting a national do-not-call list to "prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law. . . ."[128] Businesses' and telemarketers' use of the database to comply with the FTC's regulations would violate this section because use of the database for compliance with the requirements of another federal agency's rules do not arise under § 227. Because the same would be true of any national database created pursuant to a

[124] 47 U.S.C. §227(a)(3).
[125] *See id.*
[126] *See FTC NPRM*, 67 Fed. Reg. at 4532 (reaffirming previous rejection of proposed exception for "telephone calls made to any person with whom the caller has a prior or established business or personal relationship").
[127] *See Notice*, para., 53.
[128] 47 U.S.C. § 227(c)(3)(K).

separate federal statutory and/or regulatory regime, there is no lawful means for the FCC to share a national database with the FTC. Moreover, the FTC has since proposed to use the national database that it establishes for "certain 'routine uses' that are generally applicable to other FTC records system. . . [such as] in law enforcement investigations or proceedings conducted by the Commission or by other agencies or authorities (e.g., to determine whether a telemarketer is complying with the do-not-call provision of the FTC's Telemarketing Sales Rule), as well as other regulatory or compliance matters or proceedings."[129] Such uses present an equally glaring conflict with the requirements of § 227(c)(3)(K).

The FTC's NPRM also fails to satisfy other requirements of § 227(c)(3), but full analysis is premature since the FTC's rules are not final. Nonetheless, the FCC should decline to act in conjunction with the FTC to establish a single do-not-call database. Not only does the current NPRM fail to meet the procedural requirements of section 227, irreconcilable differences exist between the FTC's proposed rules and the Congressional commands found in section 227.

IV. A NATIONAL DO-NOT-CALL REGIME POSES AN UNDUE BURDEN ON COMMON CARRIERS

The TCPA states that "[i]f the Commission determines to require [a national do-not-call] database, such regulation shall … require each common carrier providing telephone exchange service, in accordance with regulations presubscribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that

[129] *Privacy Act; System of Records*, 67 Fed. Reg. at 8986.

such subscriber objects to receiving telephone solicitations."[130] The Commission seeks comment on the codification of this provision.[131] The requirement to provide such notification has the potential for being exceedingly costly to carriers. These costs will utlimately be borne by telephone subscribers and must be considered in the Commission's evaluation of whether the costs of NDNC outweigh the benefits. If the Commission were to adopt a NDNC database and implement this provision, in order to reduce the costs the Commission should only require carriers to provide a one-time notification to current subscribers. Notification to future subscribers will be unnecessary because their previous carrier would already have notified those subscribers.

The TCPA also states that "[i]f the Commission determines to require [a national do-not-call] database, such regulation shall…require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder."[132] Carriers are not usually aware of a subscriber's intended use of its service. Such notification could be infeasible or extremely costly. The practicality of this provision should be a factor in the Commission's decision as to whether or not to adopt NDNC pursuant to the TCPA. The Commission should also seek comment on the implementation of this provision.

THE COMMISSION SHOULD RETAIN, BUT SLIGHTLY MODIFY, ITS CURRENT TCPA RULES

The Commission seeks comment on the effectiveness, or need for modification, of its current rules implementing the TCPA. As noted previously, WorldCom supports

[130] 47 U.S.C. 227(c)(3)(B).
[131] *Notice*, para. 54.
[132] 47 U.S.C. 227 (c)(3)(L).

the comments being filed today by DMA with regard to these issues.[133] WorldCom hereby provides additional comments on the effectiveness of company-specific lists, the benefits of predictive dialers, and suggestions and concerns regarding he proposed regulations on the use of predictive dialers.

WorldCom also explains why the industry is unable at this time to assess, or address, the impact that number portability and number pooling may have on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA.

I. COMPANY-SPECIFIC LISTS ARE THE MOST APPROPRIATE MEANS OF PROTECTING CONSUMERS FROM UNWANTED TELEPHONE SOLICITATIONS.

Company-specific do-not-call lists offer consumers an effective mechansim to stop unwanted telephone solicitations and offer significant advantages over NDNC to both consumers and telemarketers. Company-specific do-not-call regulations allow consumers to learn of new service offerings or price reductions they may not have anticipated, while protecting them from undesired repeat calls from a company. A message cannot truly be deemed unwanted until it is received and rejected at least once. Although consumers may say they object to telephone solicitations in general, consumers' actions speak louder than words. The fact that one half of households

[133] As addressed in the introduction, WorldCom generally supports DMA's comments with regard to predictive dialers, with the exception of the DMA's proposed standard on the abandonment rate. Specifically, WorldCom does not agree that a standard below 5% is reasonable, nor should the Commission limit the time period, at least not to a per month or a per day standard, for measuring the standard. *See supra*, n.6 and *infra*, pp. 43-45.

surveyed purchased a product or service over the phone in the last year demonstrates that consumers respond favorably and benefit from telephone solicitations.[134]

Company-specific do-not-call lists also allow consumers to pick and choose the companies from which they wish to receive telephone solicitations. The fact that consumers appreciate the ability to pick and choose the entities that contact them is demonstrated by a recent survey. The majority of respondents said that they rarely, never, or from "time to time" requested individual organizations not to call them at home.[135]

A company has a strong incentive, in addition to regulatory compliance, not to telemarket a consumer that has specifically stated that she did not want to receive telephone solicitations from it. For one, it preserves resources for solicitations to those individuals that are more apt to respond favorably to the solicitation. Second, companies are also aware that ignoring a consumer's request could foreclose future business opportunities with that consumer.[136]

As such, MCI takes great measures to ensure that consumers who specifically express a desire not to be called by MCI are not called by MCI. In addition to making verbal requests during a sales call, consumers can place their names and numbers on MCI's do-not-call list by emailing MCI's Customer Service or by calling Customer Service via a toll free number.[137] MCI sales representatives honor those requests using a simple systematic process. MCI also provides thorough, annual training to its

[134] *Supra*, n. 24.
[135] IPI Report, p. 4.
[136] *See* Graves, para. 8-9.
[137] *Id*. Additionally, the Commission seeks comment on whether companies should be required to provide some means of confirmation so consumers may verify that their requests have been processed. *Notice*, para. 17. First, the record does not demonstrate that company-specific do-not-call requests are being ignored. Second, there would be substantial costs associated with such a requirement. Third, such a requirement would likely cause annoyance to consumers who requested no further contact from the company by any vehicle.

telemarketers on compliance with do-not-call regulations and company policies and maintains a written policy as required by the TCPA.[138]

Company-specific lists also are better for consumers than NDNC because fulfillment of requests to be placed on such lists is faster than with NDNC. Experience in the states demonstrates that it can be months between when the consumer signs-up for the state do-not-call list and the required compliance by companies. Company-specific requests can be honored far more quickly. Do-not-call requests made to directly to MCI are implemented in at most two weeks, and often within twenty-four hours.[139]

With regard to the Commission's regulations concerning company-specific do-not-call lists, WorldCom would, however, like to take the opportunity to strongly urge the Commission to revisit its rules regarding how long a listing must be retained on the company's do-not-call list. The tremendous turnover in telephone numbers means the lists become quickly outdated.[140] Consequently, consumers who never requested to be placed on a particular company's do-not-call call list are being denied a potentially valuable contact by that company. Moreover, telecommunications markets are evolving and expanding rapidly. Companies are continuously offering new and innovative products and services never dreamed of by consumers. Ten years is therefore far too long a time to deny a consumer information on a company's progress on new offerings.

WorldCom suggests the required retention period should be no more than five years. Marketers should also be permitted to cross-reference numbers with the Postal Service's National Change of Address (NCOA) system and other data sources to verify that a number has not been reassigned.

---

[138] *See* Graves, para. 8.
[139] *Id.*, para. 11.

II. THE REGULATION OF PREDICTIVE DIALERS IS NOT NEEDED AT THIS TIME, BUT IF REGULATED, IT SHOULD BE IN A MANNER THAT DOES NOT, IN EFFECT, BAN THE USE OR ELIMINATE THE BENEFIT OF PREDICTIVE DIALERS.

A predictive dialer is customer premise equipment that is attached to the Automatic Call Distributor (ACD)[141] and used to initiate the dialing of pre-determined telephone numbers in a manner that makes efficient use of the sales associates' time. The dialer equipment typically includes software, known as answering machine detection (AMD), which detects when a call is received by an answering machine rather than a "live" person.[142] MCI uses predictive dialers in all of its telemarketing call centers located in various states.[143]

Predictive dialers are a critical marketing tool because 86% to 89% of all outbound dialing does not reach an actual person. Instead, the vast majority of calls are not answered, the line is busy, it reaches a voice messaging service, or an answering machine picks up the call.[144] Predictive dialers enable callers to conserve resources and to target its personnel to calls where a person has actually been reached. The AMD component of predictive dialers itself has a substantial positive impact on productivity, since over one-third of outbound calls are picked up by answering machines.[145]

Additionally, predictive dialers reduce the risk of human error in dialing. In particular, predictive dialers assist companies in ensuring that the telephone numbers on its company-specific do-not-call list, or other prohibited numbers, are not dialed. Before loading the numbers into the equipment, MCI runs the numbers against its suppression

---

[140] *Supra* p. 17, n. 53.
[141] ACD is the telephony switching system the routes the calls to the available representatives.
[142] *See* Exhibit B, Declaration of Randy Hicks on behalf of WorldCom, Inc.
[143] Hicks, para. 4.

files, which includes company-specific do not call numbers and other numbers that should not to be called. If a number is not to be called, it will not be loaded into the system and therefore will not be called.[146] Further, dialers provide a method of controlling the quality and accuracy of the calls being made. The system tracks which telemarketer handled which call, allowing for future coaching and training. This is exceedingly important in maintaining regulatory compliance for a company that employs thousands of telemarketers. The dramatic reduction in costs and enhanced regulatory compliance capabilities resulting from the use of predictive dialers are highly beneficial to consumers, telemarketers, and regulators.

Cognizant of the benefits of predictive dialers, the Commission is concerned with the harm to consumers as a result of the potential for abandon calls and "dead air" posed by this technology.[147] An "abandoned call" is a call that is disconnected by the equipment after a "live" person has answered the call because no calling party agent is available to handle the call.[148] "Dead Air" is the few seconds of silence a called party may experience as the call is being transferred to the calling party's agent.[149] The Commission seeks recommendations on what approaches it might consider to minimize any harm caused by the use of predictive dialers.[150] Specifically, the Commission seeks comment on whether requiring a maximum setting for the abandonment rate on

---

[144] *Id*.
[145] *Id.*
[146] *Id*., para. 3.
[147] *Notice*, paras. 26-7.
[148] Hicks, para. 7. *See also, Notice*, para. 27
[149] *See Notice*, para. 27.
[150] There is no material evidence of substantial consumer harm to justify regulation by the Commission. The Commission reports receiving 1,500 *inquiries* in a recent eighteen-month period and 16,000 hits to the Commission's consumer alert website on predictive dialers. *Notice,* para. 26. Inquiries regarding a new technology do not necessarily indicate that consumers are harmed by that technology, nor do hits to a particular Commission website. In fact, the information the Commission provides on its website may be effectively alleviating any consumer concern that may exist as a result of the use of predictive dialers.

predictive dialers or requiring telemarketers who use predictive dialers to also transmit caller ID information are feasible options for telemarketers.[151]

As discussed Exhibit C, any regulation that significantly restricts or bans the use of predictive dialers will substantially increase sales costs, costs which will ultimately be borne by consumers and harm competition.[152] Moreover, regulation of the use predictive dialers by those engaging telephone solicitations will not completely eliminate abandoned calls, "dead air," or consumer's concern with unidentified calls.[153] Entities and uses that are not be subject to the Commission's regulations, such as non-profits or uses for surveys, would mean that unregulated use of predictive dialers would continue and contribute to the volume of incoming, and possibly, abandoned calls. Moreover, people are exposed to "abandoned calls" or "dead air" unrelated to the use of predictive dialer, e.g., as a result of someone dialing a wrong number. If these persons or entities have unlisted numbers or block their numbers before making their calls, and possibly if they are calling from out of the calling area, their number will likewise not register on caller ID devices.

The Commission should not impose regulations that have the potential of foreclosing the use of predictive dialers. Rather, if the record demonstrates a need, the Commission should adopt regulations that prevent the use of predictive dialers in a manner that is heedless of the number of abandoned calls generated.

A. THE ESTABLISHMENT OF TOO LOW AN ABANDONMENT RATE COULD ELIMINATE ALL OF THE BENEFITS FROM THE USE OF PREDICTIVE DIALERS

[151] *Notice*, para. 26.
[152] *Supra*, n. 141.
[153] *See Notice*, para. 15.

The abandonment rate is determined by the number of abandoned calls versus the total number of "live" person's reached.[154] If the Commission determines it should establish a maximum setting on the abandonment rate, the rate should be at a level that will prevent demonstrated misuse of the equipment by careless users, not one that will eliminate all the benefits the equipment provides. The feasibility of both retaining the benefit of predictive dialers and complying with a mandated maximum abandonment rate depends on the level at which the rate is set, as well as any criteria established for the calculation of that rate. Since numerous factors interplay in the calculus of an abandonment rate, the Commission should not adopt a mandatory maximum abandonment rate without seeking comment on a specific proposal.

WorldCom has determined that its 3-5% abandonment rate is the lowest feasible rate possible in order to obtain the productivity benefits of predictive dialers. As discussed in Exhibit C, WorldCom has performed controlled tests in an effort to decrease its current abandonment rate of approximately 3-5% to reach a 1% abandonment rate. The testing indicated that in order to reduce the abandonment rate to this level the predictive dialing system had to be aborted. This meant moving to an auto dialer mode, which reduced productivity by approximately 50%. Moreover the test determined that the 1% goal was not attainable even in the auto dial mode. This is a substantial decrease in productivity relative to the respective minimal decrease in number of potential abandon calls.[155] Consequently, if the Commission were to set a maximum abandonment rate, that rate should not be below 5%.

[154] Hicks, para. 7.
[155] Hicks, para. 8.

Moreover, the Commission should afford reasonable flexibility to users of predictive dialers in determining the time period over which the abandonment rate will be calculated. Calculating the rate over a six-month period rather than on per month or per day period, for example, does not increase the risk to any individual consumer of receiving an abandoned call. But such flexibility does provide companies pliability in structuring their marketing campaigns, and may assist in compliance and enforcement efforts.

B. REQUIRING THE TRANSMISSION OF CALLER ID AS A CONDITION OF PREDICTIVE DIALER USE IS A POTENTIAL BAN ON THE USE OF PREDICTIVE DIALERS.

Requiring the transmission of caller ID information as a precondition to use of predictive dialers could, in effect, be a ban on predictive dialers.[156] Most, if not all, telemarketing centers are currently technically unable to transmit caller ID information. In order to accommodate such a condition, most companies would have to upgrade their current switches and circuits, at considerable expense and time. Yet, the transmission of caller ID information by a company engaging in telemarketing does not guarantee that the common carriers carrying the traffic, or the carrier terminating the traffic to the end-user, will be able to continue the transmission of this information to the end-user.[157] This would mean the called party might still receive an unidentified message like "out of area."

[156] The Commission asks whether an abandon call violates the Commission's current rules regarding identification of the caller, specifically 47 C.F.R. §64.1200(d). *Notice*, para. 29. 47 C.F.R. § 64.1200(d) refers to telephone messages. In an abandoned call there is no message and therefore no violation of the Commission's rule.

[157] For one, caller ID is contingent on the use of Signal System 7 (SS7), which is not ubiquitous throughout the country. The terminating carrier would also need to have the telemarketer listed in its database in order to send the telemarketers name.

Before considering such a mandate the Commission should specifically seek comment on the costs and time associated with the implementation of such a mandate. The Commission should also seek comment on the ubiquity and availability of Caller ID subscription to determine the potential extent of consumer impact.[158]

III. IT IS PREMATURE TO ASSESS, OR ADDRESS, THE IMPACT THAT NUMBER PORTABILITY AND NUMBER POOLING MAY HAVE ON THE CAPABILITIES OF TELEMARKETERS TO IDENTIFY WIRELESS NUMBERS IN ORDER TO COMPLY WITH THE TCPA.

WorldCom is unaware of any technological tools that would allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or to recognize wireless numbers that have been assigned from a pool of numbers that formerly were all wireline. Nonetheless, the Commission should take no immediate steps to address the impacts of number portability and number pooling on the capabilities of telemarketers to identify wireless numbers in order to comply with the TCPA. These events could have little to no impact on the capabilities of telemarketers. Alternatively, they could have a significant impact. The Commission should wait to see if there is a significant impact before it considers whether to require that the industry and telemarketers undertake potentially costly steps to avoid what might be a very small problem.

Until wireless carriers actually begin to participate in number pooling and number portability, it is difficult to assess whether those activities will have a significant impact on the ability of telemarketers to identify wireless numbers in order to comply with the TCPA. For example, it is possible that when wireless carriers participate in pooling, they

[158] Furthermore, since the Commission's rules generally allow callers to block the transmission of caller ID information, a mandate that telemarketers transmit caller ID information raises constitutional concerns. *See*

will prefer to receive pooled blocks that were originally donated by other wireless carriers rather than by wireline carriers. There are a couple of reasons why this could turn out to be the case. First, wireless carriers may establish rate areas that are larger than the rate areas established by wireline carriers. If this is the case, wireless carriers will participate in unique pools that do not include wireline carriers. Second, wireless carriers may serve local calling areas that are substantially larger than those served by wireline carriers. In this circumstance, acceptance of a block donated by a wireline carrier could create serious intercarrier compensation issues for the wireless carrier.

The Commission should ask its expert advisory group, the North American Numbering Council (NANC) to assess the impact of number pooling on the ability of telemarketers to identify wireless numbers. The NANC, working with the North American Numbering Plan Administrator and the Pooling Administrator, could gather information on the extent to which wireless carriers actually receive number blocks from NXX codes that were originally assigned to wireline carriers. If it turns out that such activity is common, the Commission could determine whether there is a low cost way for the Pooling Administrator to assist telemarketers in obtaining accurate information on the assignment of "wireline" blocks to wireless carriers.

The impact of number portability on telemarketers is even more speculative than the impact of number pooling. At this time, it is not at all clear when, or even if wireline numbers will ever be ported in any significant volumes to wireless carriers. The Commission has repeatedly delayed implementation of wireless number portability. If one thing is likely, it is that wireless carriers will seek further delay. Moreover, even if wireless carriers do implement number portability, it remains to be seen whether any

---

supra, pp. 26-30.

significant amount of wireline-wireless porting will occur. There are significant unresolved issues associated with wireline to wireless porting. For example, wireless carriers have indicated that porting intervals on the wireline side are too long and would not be acceptable to wireless customers, who expect their number to be activated almost immediately. Until wireless carriers actually implement portability and the industry gains experience in the feasibility and popularity of wireline to wireless porting, it would be premature to require the implementation of potentially costly steps.

CONCLUSION

The Commission should refrain from adopting a national do-not-call regime and should retain, with some modification as discussed above, the current rules implementing the TCPA.

Respectfully submitted,

WORLDCOM, Inc.

/s/ Karen Reidy
1133 19th Street, NW
Washington, DC 20036
(202) 736-6489

Its Attorney

December 9, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
of 1991	)	

DECLARATION OF ANDREW M. GRAVES
ON BEHALF OF WORLDCOM, INC.

Based on my personal knowledge and on information learned in the course of my business duties, I, Andrew Graves, declare as follows:

1. My name is Andrew M. Graves. I am employed by MCI WorldCom Communications, Inc., ("MCI") a wholly owned subsidiary of WorldCom, Inc., as Senior Manager of Marketing Strategy and Policy for the MCI Group. My business address is 22001 Loudoun County Parkway, Ashburn, VA 20147. I have ten years experience in the telecommunications field, having held Finance and Product Marketing positions, with MCI WorldCom or its predecessor company, MCI Telecommunications Corporation. Currently one of my primary functions is overseeing MCI's compliance with regulations related to the marketing of our local and long distance services to residential consumers.

2. The purpose of my declaration is to describe the substantial benefits of telemarketing in generating telecommunications sales and assisting telecommunications buyers. I also discuss the negative impact state do-not-call lists have had on MCI's ability to compete and introduce new competitive service offerings to telecommunications consumers. Finally, I discuss why company-specific do-not-call lists are a more appropriate means for allowing consumers to prevent unwanted telephone solicitations to their homes.

BACKGROUND

3. MCI was built, and endures, by bringing competitive and new telecommunications services to consumers across the country. In the long distance market, available prices are lower than ever before and consumers have increased options with regard to their services. Now, in many regions of the country, competition is delivering lower prices, product innovation and better service to consumer of local telecommunications services. Consumer reaction to local competition is extremely favorable. Four years since launching a competitive local product in New York, MCI has acquired 2.4 million subscribers across forty states plus the District of Columbia. In April 2002, MCI introduced The Neighborhood, an innovative all-distance telecommunications product that combines a special feature package with unlimited local and long distance calling for one price. Astoundingly, MCI welcomed half a million customers to The Neighborhood in just 8 weeks after launch, hitting the 1 million customer mark just 24 weeks after launch.

BENEFITS OF TELEMARKETING TO TELECOMMUNICATIONS SALES AND CONSUMERS

4. The Neighborhood would not have been so phenomenally successful without MCI's telemarketing capabilities. Telemarketing is responsible for the majority of the Neighborhood sales. It is also responsible for the majority of MCI's telecommunications sales in general. MCI's experience demonstrates that telemarketing is the most effective way to introduce new products and services to the public, especially local and long distance telecommunications services, and acquire customers from incumbent providers.

5. Consumers are accustomed to making telephone service decisions in response to telephone solicitations. This is because telemarketing has proven instrumental in

describing complex service offerings to consumers. This is important because telecommunications service offerings are designed to allow customers to customize their service to their specific calling needs. Telecommunication products vary greatly, offering customers a choice of one or a combination of the following services: InterLATA Long Distance, IntraLATA Toll, Local Line, Calling Card and International. For these services, customers can pick and choose a variety of rates and plans that specifically address their needs, including: unlimited local and long distance calling; reduced interstate, instate, card and/or international rates; local features and billing method. These can be extremely complex choices that are most effectively explained through direct communication with the customer. MCI employs thousands of well-trained telemarketers to accomplish this task.

THE EFFECTS OF STATE DO-NOT-CALL LISTS HAVE HAD ON COMPETITION

6. State do-not-call lists have substantially impacted MCI's ability to compete by raising our costs of marketing lower-priced competitive offers to residential consumers. These lists have also hindered the expansion of local competition by restricting our ability to introduce our new products and services to those consumers who might not otherwise learn of these competitive choices. Thus, state do-not-call lists mean that some customers might never learn that they have a choice for local phone service, killing local competition before it even takes hold.

7. MCI performed an analysis of three pairs of states, each pair containing one state governed by a state do-not-call list and the other not governed by such a list, in order to assess the impact of state do-not-call lists local market penetration. The pairs were matched based on a similar population and launch date to reduce other irrelevant

factors. MCI found that its local market penetration was significantly higher in the states not governed by a state do-not-call list, up to 60% higher. MCI's assessment is that the variance is substantially the result of the reduced number of households MCI contacted in certain states due to the exclusion of state do-not-call participants. This means thousands of consumers in these states, who did not specifically request MCI not to call them, were nevertheless denied information on a new competitive choice for local phone service.

THE EFFECTIVENESS OF THE CURRENT COMPANY-SPECIFIC LISTS IN PREVENTING UNWANTED CALLS

8. Reasonable alternatives to a national do-not-call database already exist today to allow consumer to stop unwanted telephone solicitations. Current federal rules and private industry practice provide consumers with effective means to reduce unwanted telemarketing calls. The most effective is the company-specific do-not-call list mandated by the Federal Communications Commission (FCC) pursuant to the Telephone Consumer Protection Act (TCPA). The telephone numbers of individuals who do not want to be called by MCI are kept on the company-specific suppression list and are excluded from MCI's marketing campaigns. Enforcement actions can be taken against companies that violate the FCC's rules. MCI recognizes the significance of that potential. Accordingly, MCI provides thorough, annual training to its telemarketers on compliance with do-not-call regulations and company policies and maintains a written policy as required by the TCPA.

9. In addition to being mandated, the company-specific do-not-call list is an important component of the telemarketing infrastructure. It is not in MCI's interest, and is a waste of valuable resources, to call those consumers who have advised us that they don't want to hear from MCI specifically. As such, MCI not only honors verbal do-not-

call requests made by a consumer doing a sales call, consumers can place their names and numbers on MCI's do-not-call list by emailing MCI's Customer Service or by calling Customer Service via a toll free number.

10. In contrast, participation in a national or state do-not-call list does not necessarily mean that the consumer would not respond favorably to a sales call from MCI in particular. A consumer may be interested in offers of lower telephone rates, but not credit card offers, insurance plans or lawn mowing services. The consumer may also enroll in a state or national do-not-call list as an initial reaction to a particularly unpleasant call by one company.

11. Experience in the states also demonstrates that company-specific "do-not-call" requests can be honored in a more timely fashion than requests to be placed on state "do-not-call" lists. It can be months from when the consumer signs-up for the state do-not-call list to the time of required compliance by companies governed by such lists. Company-specific requests can be honored far more quickly. Do-not-call requests made to directly to MCI are implemented in at most two weeks, and often within twenty-four hours.

12. Company-specific lists makes sense because they allow consumers to tailor the calls that they are willing to receive, while not to preventing calls that may be of interest to them. While not all consumers like receiving telemarketing calls at what may be inconvenient times, generally consumers find it an easy way to take advantage of new cost-saving offers of which they might not have otherwise been aware.

CONCLUSION

13. This concludes my declaration on behalf of WorldCom, Inc.

I declare that the forgoing is true and correct to the best of my information and belief.

Executed on December 6, 2002.

/s/ Andrew M. Graves

Exhibit B, WorldCom Comments

T. Randolph Beard, PH.D., "Telemarketing and Competition: An Economic Analysis of "Do Not Call" Regulations" (March 2002)

(See Attachment)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act	)	CC Docket No. 92-90
of 1991	)	
	)	

DECLARATION OF RANDY HICKS
ON BEHALF OF WORLDCOM, INC.

Based on my personal knowledge and on information learned in the course of my business duties, I, Randy Hick, declare as follows:

1. My name is Randy Hicks. I am employed by WorldCom, Inc. ("WorldCom") as the Director of Automation and Network Operations in the Operations group of WorldCom. In that position, I am responsible for providing Customer Self Service capabilities, Voice and Data network design/support and Call Center Telephony switching systems. I have participated in the development, testing and use of predictive dialers for telemarketing telephone services.

2. The purpose of my affidavit is to describe the operation and benefits of the predictive dialing equipment used by WorldCom.

3. Predictive dialer is a software driven system that integrates with telephony switches and is designed to initiate the dialing of predetermined telephone numbers. The main purpose of a using a predictive dialing process is to enable an entity making numerous calls in an attempt to reach "live" persons to make the most efficient use of its resources, specifically the personnel handling the calls. The other important function

served by this system is that it can control the numbers that are called. An entity will only load the equipment with numbers it wants to call, thereby ensuring only those numbers are dialed by the system. MCI, for example, will only load numbers that have been run through a process that excludes numbers that MCI should not be calling, such as numbers listed on MCI's company-specific do-not-call list.

4. The predictive dialing system has a substantial positive impact on the preservation of callers' time and productivity because only one out of every seven to nine dialed calls results in a connection with a person. The other calls are not answered or reach busy signals, recorded messages, voice mail, answering machines, or other non-"live" responses. Answering machines, in particular, account for most of these nonproductive calls, being responsible for 35% to 40% of such calls. By avoiding the 86% to 89% of all outbound dialing that does not reach a person, an entity can be seven to nine times more successful at reaching prospects than it would be without the use of predictive dialers. Consequently, predictive dialers are a valuable cost-effective tool for pollsters, political campaigners, telemarketers, and charitable organizations. MCI uses predictive dialers in all of its telemarketing call centers, which are located in various states. Calls to consumers nationwide may be made from any of the call centers in these states, depending upon workload and availability.

5. The predictive dialing process employs two machines, a predictive dialer engine and an automatic call distributor (ACD). The predictive engine provides technology for self-adjusting, adaptive algorithms that minimize agent wait times and prospect abandonment rates. It is programmed to send telephone numbers contained in a database to the ACD at a certain rate. The ACD dials the telephone numbers and uses

answer detection software that is designed to determine call disposition. The answer detection software is designed by the manufacturer to detect sound energy within the range of human voice frequency and duration. If the call is determined to be "live," the ACD instantly sends the call to a sales representative. If no representative is available the ACD places the called party's circuit in queue to be served by the next available sales representative.

6. The answering machine detection (AMD) component of the answering detection software relies on the observations of two timers. The first one ("voice timer") begins at the time of voice energy detection; the second one ("pause timer") begins with a pause in speech that generally follows a greeting. The AMD timers determine the maximum time for answer detection of a circuit on which voice energy has been detected. It may be set based upon the client's experience with how long it takes a person to state his/her greeting. For example, excessively long greetings are probably message machine greetings. Once the voice timer's time limit has been exceeded, the ACD will disconnect the circuit. The voice timer will run for the programmed length of time unless one of two things happens. One would be the detection of a pause of the required duration by the pause timer. When this occurs, it is presumed to be a "live" person's voice and the circuit is routed to an agent or queue if no agents are available. The other circumstance could be a hang up by the called recipient.

7. The system has the potential of reaching more "live" called parties than the number of available agents to service the calls. The ACD will hold the call in queue for a predetermined length of time (a few seconds), and if there are no representative available within that period, the ACD will terminate the call and the called party will be

disconnected. This is what is termed an abandoned call. The abandonment rate is determined by the number of abandoned calls versus the total number of "live" person's voices reached.

8. MCI, and any responsible user of the predictive dialing system, ensures the lowest number of abandoned calls feasible, while still obtaining the benefits of the system. MCI follows the Direct Marketing Association's guidelines that the rate be as close to 0% as possible, not to exceed 5%. MCI performed numerous studies in a controlled environment to determine the feasibility, and impact on productivity, of reducing its current abandonment rates of 3%-5% to a 1% abandonment rate. The testing indicated that in order to reduce the abandonment rate to this level, the predictive dialing system had to be aborted. This meant moving to an auto dial mode, which reduced productivity by approximately 50%. Moreover, the tests determined that the 1% goal was not obtainable even in the auto dial mode. MCI has determined that its 3% to 5% is the lowest feasible rate possible in order to obtain the productivity benefits of predictive dialers.

I declare that the foregoing is true and correct to the best of my information and belief. This concludes my declaration.

Executed on December 6, 2002.

/s/ Randy Hicks